IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 510

PAUL KNAUER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ODE L. RANKIN,
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SUPREME COURT OF THE UNITED STATES

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No. 510

PAUL KNAUER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner, Paul Knauer, prays for the Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit to bring up for review here the judgment of said Court affirming a decree of the District Court of the United States for the Eastern District of Wisconsin, by which the order of a State Court of Wisconsin admitting petitioner to citizenship was vacated and his Certificate of Citizenship cancelled.

Summary Statement of Matter Involved

Your petitioner was born at Saalfeld, Germany, March 3, 1895, came to the United States in April, 1925, filed a Declaration of Intention of becoming a citizen of the United

States on December 4, 1929, and on November 20, 1936, filed his Petition for Naturalization in the Circuit Court of Milwaukee County, Wisconsin, a Court of unlimited jurisdiction.

On April 13, 1937, your petitioner's application for citizenship was heard by said State Court and upon full hearing said Court found that petitioner was entitled to admission to citizenship, and accordingly the required oath of allegiance was administered to and taken by your petitioner; that thereupon the Court entered its judgment admitting petitioner to citizenship, and pursuant to such judgment, the Clerk of said State Court issued to petitioner a Certificate of Naturalization.

That by said judgment petitioner became and thereafter was a citizen of the United States with all the privileges of native born citizens and entitled under the Constitution to equal privileges and immunities and thereafter continued to reside in Milwaukee, Wisconsin.

The Complaint

On February 3, 1943, the District Attorney of the United States for the Eastern District of Wisconsin filed in the District Court of the United States for the said District at Milwaukee, Wisconsin, a complaint charging that petitioner had obtained said decree and Certificate of Naturalization from said Wisconsin State Court "fraudulently *and* illegally" (Tr. 1-3), which complaint was upon final hearing amended to read "fraudulently and *therefore* illegally" (Tr. 75).

The said complaint, which was not under oath, charged that your petitioner falsely represented in his petition for naturalization that he was attached to the principles of the United States Constitution at the time of filing his said petition and for five years prior thereto; that he did not

intend to renounce allegiance and fidelity to the German Reich of which he was a subject, and did not intend to reside permanently in the United States; and that, likewise, his oath of allegiance to the United States was false in that he did not in fact renounce allegiance to the German Reich, nor intend to support the Constitution of the United States nor to bear true faith and allegiance to it (Tr. 1-3).

The order of the Wisconsin State Court was not alleged to be void for want of any jurisdictional fact, nor invalid for any reason. There is no allegation in the said Petition as to what was said or what evidence was heard before the Wisconsin State Court, or the extent or scope of the evidence upon the hearing of petitioner's application for citizenship—the charges are that petitioner swore falsely to the said statements in each of said documents.

The prayer of the Complaint of the United States was that the order of the State Court admitting petitioner to citizenship be vacated and set aside and that his Certificate of Naturalization issued by the Clerk of the Wisconsin State Court be set aside and petitioner forever restrained from claiming under it (Tr. 3).

Your petitioner appeared pro se and conducted his own defense.

Answer of Petitioner

Your petitioner filed his Answer to said Complaint (Tr. 4) denying all charges therein made against him, claiming that his purposes were high; that he had been examined by governmental agencies as to his knowledge and belief in the American form of government; that he called two competent witnesses to verify his character, his qualifications for citizenship and his beliefs; all of which were found to be above reproach and in full accord with his statements and declarations made in his said Petition; that with a clear conscience, and, without any mental reservation or purpose

of evasion whatsoever, he swore to renounce and abjure all allegiance and fidelity to the German Reich of which he had theretofore been a citizen and likewise to support and defend his newly adopted homeland and to uphold, support and defend its Constitution and laws against all enemies, foreign and domestic; that he did not commit any illegal act to obtain his naturalization papers, and that he did not acquire his Certificate of Naturalization fraudulently and falsely; that he definitely intended to bear true allegiance to the United States and did not intend to remain a citizen of the German Reich. (Tr. 4-10).

Your petitioner alleged in his said Answer that the said proceeding to denaturalize him was in violation of the 14th Amendment to the Constitution, which provides that all persons of the United States, born or naturalized therein, are entitled to equal privileges and immunities; that the Nationality Act of 1940 should be held to be a criminal statute and a jury trial allowed and, unless so construed, would violate the 6th Amendment of the Constitution; and violates the 8th Amendment to the Constitution, and is an ex-post facto law violating Article 1, Section 9, Paragraph 3 of the Constitution and that it violates the due process clause of the 5th Amendment to the Constitution (Tr. 7-8).

The United States did not reply to said Answer.

Cases Consolidated for Mass Trial

About the time of filing this case, the District Attorney for said District filed a large number of similar cases and on May 12, 1943, a motion was made to consolidate this case with thirteen other similar cases with the avowed purpose of determining in one trial an issue of fact claimed to be common to all fourteen cases, and thereafter to try the remaining issues in each case separately and in

seriatim (Tr. 11). The motion, supported by affidavit of the Assistant District Attorney (Tr. 12) was resisted by your petitioner (Tr. 15), his objection overruled, and an order entered (Tr. 16) consolidating said fourteen cases for the purpose of receiving evidence.

> "concerning the organization, aims, purposes, and activities of the German-American Bund, its National and local subdivisions, its predecessors and affiliates, including the Grafton Settlement League, Inc., subject to the usual right of cross-examination and objection by each defendant,"

about which matters nothing had been said in said complaint.

It was further ordered that each defendant might introduce evidence as to such issues, and that each defendant in his subsequent trial might introduce pertinent evidence as to his individual case, and that after conclusion of the trial of the consolidated issues, the trial of each individual defendant should continue separately (Tr. 18).

A pretrial conference settled the method of introduction of various exhibits, documents, newspaper articles, translations, etc. (Tr. 18).

The evidence taken in the mass hearing in typewritten question and answer form, some 1400 typewritten pages, is in the record but was never abstracted or printed; exhibits received in evidence in great numbers, and in large bulk, are in the record but have never been described in a printed record. Also the testimony taken in the subsequent and separate trial of your petitioner is in the record, in typewritten question and answer form, some 1000 pages, never having been abstracted or printed.

The transcript of the proceedings in the trial court were not printed for the Circuit Court of Appeals, that Court having considered the record in that typewritten form, with

printed briefs of respective counsel, who were privileged by order of Court to refer in their briefs to the typewritten record; that such procedure was adopted because of the inability of petitioner to carry the financial burden.

The Mass Trial

The mass trial was commenced on September 21, 1943, consuming approximately eight court days; some thirty-odd witnesses were examined; 1433 pages of typewritten testimony taken; 100-odd exhibits were introduced, including books, editorials, news articles, speeches, pamphlets, hearsay, broadcasts, deductions and suspicions.

The Individual Trial of Petitioner

At the conclusion of the mass trial, the individual trial of your petitioner was commenced on November 22, 1943 and consumed six and one-half days, when it was adjourned on December 1, 1943, and was resumed on January 6, 1944, and another day was consumed. 1046 pages of testimony were taken and some 200-odd exhibits were introduced.

The Findings of the Mass Trial

On May 25, 1944, the trial Judge of the District Court filed certain findings pertaining to the evidence produced in the mass trial as to ten of the defendants, including your petitioner (four having been dismissed).

The findings, consisting of 26 paragraphs, 1 to 26 (Tr. 18-28), state that each petition contained identical allegations as to their several intentions not to become bona fide citizens, in that, the mental attitude of each was opposed to the statements he made in his application and in his oath.

The Court found that the issues tried en masse were common to all of the cases and that the principal common issue concerned the organization, aims, purposes and ac-

tivities of the German American Bund, its National and local subdivisions, its predecessors and affiliates, including the Grafton Settlement League, Inc. (Tr. 20).

The Court then holds:

> "The evidence clearly, unequivocably and convincingly, establishes that the German American Bund and its predecessor organizations were Un-American and subversive, and that the teachings were contrary to the principles of the Constitution of the United States" (Tr. 20).

The Court then concludes:

> "2. The fact that a person was a member of a local unit of the Bund is not in itself sufficient to prove fraud which would warrant cancellation of a decree of naturalization" (Tr. 27).

Findings Made After Petitioner's Trial

On June 16, 1944, the Court filed a memorandum opinion with its findings in your petitioner's case in which the Court said that the burden was on the plaintiff "to establish its contentions affirmatively by evidence clear, convincing and unequivocal,—to all practical intents and purposes beyond a reasonable doubt" (Tr. 30).

The trial judge further stated that most of the statements of the defendants in the consolidated cases, relied upon by the Government to show mental attitude at the time their oaths were taken, "were made before our Nation was attacked" (Tr. 30).

The trial judge did not, however, separate his findings so as to show what was done and said *before naturalization*, and what was said and done *after the oath* of allegiance.

The "findings" of the trial judge are predominately conclusions, inferences, deductions, presumptions, inferences upon inferences.

The ultimate conclusions of the trial judge, based upon other conclusions, are that, after petitioner was admitted to citizenship in 1937, through 1941 (Pearl Harbor), his attitude toward fidelity and allegiance and attachment to the principles of the Constitution were the same as prior to the date of naturalization (Finding No. 59, Tr. 41); and that, from the conduct of petitioner through the years *before and after* his naturalization as well as the evidence *in its entirety* the Court concludes that when petitioner filed his application for citizenship, at the time of his naturalization, and at all times thereafter, your petitioner did not in good faith intend to renounce allegiance and fidelity to the German Reich, and did not in fact do so (Finding 60, Tr. 42), and the Court finds, as it says, from petitioner's beliefs in and to National Socialism and activities in promoting it, opposition to political and racial equality, that during said time petitioner was not in fact attached to the principles of the Constitution and did not intend to support it (Tr. 48, Finding 61). The findings are based largely upon acts and expressions of petitioner after the date of his naturalization.

The Conclusions of Law

The conclusions of law predicated upon the Court's findings were that the order of the Circuit Court of Milwaukee County, Wisconsin, admitting defendant to citizenship and its Certificate of Naturalization "were fraudulently and therefore illegally procured and should be revoked, set aside and cancelled" (Tr. 43).

Court's Comments on Baumgartner Case

The trial Judge then comments that his findings and conclusions were made after he had an opportunity to examine the decision of this Court in *Baumgartner v. U. S.*,

322 U. S. 665, decided June 12, 1944, four days prior to the filing of his opinion and findings in your petitioner's case. He then distinguishes the two cases by the statement, "Here there was evidence showing the attitude of the defendant prior to the date that he took his oath on April 13, 1937, which made him a citizen" (Tr. 43), and that he was convinced beyond reasonable doubt that petitioner practiced fraud "when he obtained his Certificate of Naturalization." However, the trial judge does not say that he was convinced beyond doubt, by the evidence of what happened prior to petitioner's oath, but relied upon the evidence in its entirety, and that he was convinced beyond doubt by all the evidence (Tr. 42).

The Decree of Cancellation

A decree was entered July 7, 1944 by which it was adjudged that the order of the Circuit Court of Milwaukee County, Wisconsin, made April 13, 1937 admitting petitioner to citizenship be revoked, set aside and cancelled, the Certificate of Naturalization issued thereon be delivered up for cancellation, and cancelled, and that petitioner desist and refrain from exercising any rights, privileges or benefits under said order and certificate (Tr. 44).

The Trial Court Did Not Follow the Schneiderman and Baumgartner Cases

In discussing, at the pre-trial conference, the procedure to be followed at the trial, and again at the opening of the mass trial, the trial judge remarked:

> "I should repeat here what I said at the pretrial conference, that it will be my *endeavor* in this case to apply the rules as laid down by the Supreme Court *and as interpreted by our Circuit Court of Appeals of the Seventh Circuit.* It may well be that their (Circuit Court of Appeals) interpretation *does not entirely*

coincide with some other Circuit Courts of Appeals, but I feel bound to follow as nearly as I can their opinion in this matter, their ideas, their interpretation" (Mass trial record, p. 18).

Your petitioner says that the holding of the Circuit Court of Appeals of the Seventh Circuit in the *Krause* case, 136 F. 2d 935, to which the trial judge referred and which he said he must follow, is out of harmony with the interpretations of other Circuit Courts of Appeal, and the decisions of this Court.

The Appeal

Appeal from said decree was perfected, bond given, and the judgment was stayed pending appeal (Tr. 65).

The Circuit Court of Appeals has also stayed its mandate pending this appeal (Tr. 97).

The Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Knauer*, 149 F. 2d 519 (Advance Sheet, No. 5, August 6, 1945).

The Circuit Court of Appeals affirmed the decree of the District Court. It did not attempt to harmonize its own opinion with either *Schneiderman* v. *U. S.*, 320, U. S. 118, or *Baumgartner* v. *U. S.*, 322 U. S. 665. Of the *Baumgartner* case it remarks that there is no resemblance to this case—and the *Schneiderman* case is given the silent treatment —not being mentioned.

However, it is to be noted that the Seventh Circuit Court said in another and earlier case, *U. S.* v. *Krause*, 136 F. 2d 935, above mentioned, that this Court did not, by its holdings in the *Schneiderman* case, intend to overrule the long line of cases in which subsequent conduct and expressions has been relied upon as a basis for can-

cellation. The *Krause* case was one of the cases relied upon by the District Court in deciding this case. Other cases of the same type are cited in the opinion of the trial judge (Tr. 29).

Your petitioner shows that other Circuit Courts of Appeal have followed the rule of evidence promulgated in the *Schneiderman* case and approved in the *Baumgartner* case and that the decisions of the Seventh Circuit Court of Appeals in this case and the *Krause* case are out of harmony with the rulings of other Circuit Courts of Appeal and those of this Court.

Questions Presented

I

Where the complaint to vacate a naturalization judgment and cancel the naturalization certificate does not question the existence of any jurisdictional objective fact necessary to a hearing by the Naturalization Court upon the subjective issues of intent, attitude, etc., does it become res adjudicata of such subjective matters?

II

Does the charge in the complaint present a case of intrinsic fraud only, and if so, is it remediable in equity at all, and has the District Court jurisdiction to question the decree of Naturalization of a State Court for intrinsic fraud?

III

Does a District Court of the United States have jurisdiction to vacate a Naturalization Decree of a State Court for mere errors of judgment in the decision of issues submitted to it by Congress for decision, and does the power of the District Court extend only to vacate a State Court

judgment upon jurisdictional grounds, i. e. for fraud affecting jurisdiction; and for lack of some jurisdictional fact rendering the naturalization illegal?

IV

Where the fraud charged is intrinsic in the issues triable by the State Court on oral evidence, and the issues are tried and become merged in the judgment of Naturalization, is such judgment res adjudicata of the matters within such issues and not vulnerable to a complaint in equity in the District Court for error in evaluating the testimony and for false testimony?

V

Does the complaint state a cause of action in equity to vacate a Naturalization judgment of a State Court?

VI

Where a Naturalization judgment is voidable only are the acts and expressions of a naturalized person made after naturalization, of sufficient probative value to vacate a naturalization judgment, where his acts and expressions are only such acts and expressions as are permissible to a native born citizen?

VII

Are the acts and expressions of a naturalized citizen made subsequent to the naturalization judgment, and which are permissible to a native born citizen, competent proof in an action to vacate a naturalization judgment, if that judgment is voidable only and not void?

VIII

Does a naturalized citizen have the rights and privileges of act and expression of a native born citizen during the

period the judgment of naturalization remains unreversed upon the record?

IX

When a judgment of naturalization is vacated, is it vacated as of the date of entry so as to render void any business transactions theretofore had where citizenship is a necessary basis to such transaction, and is a certificate of naturalization cancelled as of the date of its issue or as of the date of the decree cancelling it?

Reasons Asserted for Allowance of the Writ

I

In deciding this case neither the trial court nor the Circuit Court of Appeals followed the decisions of this Court in *Schneiderman* v. *U. S.*, 320 U. S. 118, nor *Baumgartner* v. *U. S.*, 322 U. S. 635.

II

The evidence as to the acts and expressions, both before and after the naturalization judgment, was lumped together by both trial court and Circuit Court of Appeals and treated as of equal probative effect so that occurrences following the naturalization judgment were not appraised as required by the rulings of this Court in said *Schneiderman* and *Baumgartner* cases.

III

The evidence herein, when properly appraised by this Court, which is not bound by the findings of the lower courts, will show that petitioner was admitted to citizenship without fraud or illegality in the naturalization proceedings and that he acted within his legal rights and in good faith.

IV

The finding of the trial court No. 50 (Tr. 38) that petitioner was a member of the Milwaukee Unit of the Bund is not supported by any direct evidence upon the question and petitioner, when called as a witness for the Government, positively denied that he ever was. The Circuit Court of Appeals in reaching its conclusions relied upon Finding 50 as ground for its opinion.

V

The District Judge intermingled in his findings occurrences and expressions without fixing any dates therefor and without differentiation as to before or after naturalization and based his conclusions on "the evidence in its entirety," (Finding 60, Tr. 42), or as is said "upon all the evidence the Court finds" (Finding 59, Tr. 41), all contrary to the rules promulgated by this Court for denaturalization cases, and the Circuit Court of Appeals approved the decree and itself co-mingled the facts all of which violated the confirmed rule of decision.

VI

In citizenship cases the whole record is open for review and where, on the face of the record, it appears that neither the trial court nor the Circuit Court of Appeals applied the important rulings of this Court as to evidence in this denaturalization case, and where it appears petitioner was prejudiced by such rulings, this Court should right the wrong by reviewing the case on certiorari.

VII

Not one of many favorable elements or proof is credited to petitioner in the findings and on review petitioner can present the evidence in the record so as to show that he did nothing after admission but that which any native born citizen was privileged to do, and that all his actions, mental attitudes, and conduct before naturalization was known to the Government and its examiners at the time of his admission and that he had done nothing to bar his admission to citizenship.

VIII

The Circuit Court of Appeals in its opinions and decisions is out of harmony with other Circuit Courts of Appeal in these denaturalization cases and is not following the rules of decision made by this Court to govern denaturalization cases. See *U. S.* v. *Krause*, 136 F. 2d 935, also opinion in the case at bar (Tr. 83 to 96) 149 F. 2d 519.

Jurisdiction

The jurisdiction of the court is invoked under Section 237 B of the Judicial Code as amended. 43 Stat. 927, 28 U. S. C. A. Sec. 344 (b).

The date of the final order of the Circuit Court of Appeals denying rehearing was June 28, 1945, and this Court by order of Mr. Justice Rutledge entered September 22, 1945, extended the time of filing this Petition for Certiorari to October 15, 1945.

Prayer

Wherefore, your Petitioner prays that this Court allow this Petition for Certiorari and grant the Writ of Certiorari directed to the Circuit Court of Appeals for the Seventh Circuit to bring up the record in this cause here to

review the judgments of the District Court of the United States for the Eastern District of Wisconsin and the judgment affirming the same entered by the said Circuit Court of Appeals for the Seventh Circuit.

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SUPREME COURT OF THE UNITED STATES

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PAUL KNAUER,

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BRIEF

I

The Opinion Below

The opinion of the Circuit Court of Appeals is reported as *United States* v. *Knauer*, 149 F. 2d 519 (Advance Sheet No. 5, August 6, 1945).

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 B of the Judicial Code as amended, 43 Stat. 927, 28 U. S. C. A. Sec. 344 (b).

Petition for rehearing was denied on June 28, 1945.

The order of the Circuit Court of Appeals became final on June 28, 1945, when petition for rehearing was denied (Tr. 97), and Mr. Justice Rutledge entered an order on September 22, 1945, extending time for filing this Petition to October 15, 1945.

Errors Relied Upon

The trial court erred in assuming jurisdiction upon the general allegations contained in the complaint to set aside the judgment of a State Court for alleged intrinsic fraud.

The trial court erred in drawing conclusions of law based upon acts and expressions of petitioner after he was admitted to citizenship; and erred in drawing conclusions of law from acts and expressions of petitioner before and after naturalization, and decreeing upon such conclusions.

The trial court erred in decreeing vacation of the naturalization judgment of the State Court and the cancellation of petitioner's certificate of naturalization.

The Circuit Court of Appeals erred in disregarding the rule of evidence promulgated by this Court for trial of denaturalization cases in *Schneiderman* v. *U. S.*, 320 U. S. 118, and *Baumgartner* v. *U. S.*, 322 U. S. 635.

The Circuit Court of Appeals erred in affirming the decree of the District Court.

ARGUMENT

Foreword

This case originated in peacetime and was tried in a war atmosphere.

The complaint states no equitable ground for relief and states no cause of action.

The complaint alleges that petition's Certificate of Naturalization was procured "fraudulently" and *therefore* "illegally", by falsely representing in his petition as to matters of intention, then present and future, mental attitudes of attachment and disposition, and making a false oath of allegiance—all subjective matters put in issue and judicially determined in open hearing in the State Court under spe-

cific delegation of authority by the Congress, and it is contended they are now *res adjudicata* between the parties.

It is contended that by the form of the charge every jurisdictional element of a naturalization proceeding entitling petitioner to a hearing on the subjective issues is admitted to exist; that the fraud charged is fraud in the issues tendered; that the fraud charged is intrinsic and does not form an equitable base for collaterally voiding a judgment; that "fraud" and "illegal procurement" are distinct and different bases for equitable relief; that neither ground is present, and that hence there is no subject matter for adjudication.

In the trial of this case the Court bulked together the evidence before and after the naturalization judgment, without differentiation, following the lead of the Circuit Court of Appeals, which had lately stated in *U. S. v. Krause*, 136 F. 2d 935 that in its viewpoint this Court did not intend to *overrule* the long line of cases where naturalized persons had been theretofore denaturalized upon that theory of proof. The trial court followed the *Krause* case and did not apply the doctrine of the *Schneiderman* and *Baumgartner* cases, nor follow them, nor did the Circuit Court of Appeals. It is contended that the Circuit Court of Appeals is out of harmony with this Court and in disagreement with other Circuits.

It is contended that the legal effect of the decree of the District Court is that defendant is expelled, not denaturalized.

I

Section 738 of the Nationality Code provides a new duty for district attorneys, but does not create a new jurisdiction in courts of equity. The District Attorney has here asked for relief from intrinsic fraud, the remedy for which, lies in the field of error, and over which equity does not extend its remedies.

Section 738 of the Nationality Code, first enacted in 1906 and re-enacted in 1940, provides that it shall be the duty of United States District Attorneys, upon affidavit showing good cause, to institute proceedings in naturalization courts,

> "for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

As first enacted in 1906, it provided only for cancellation of the Certificate of Naturalization. As re-enacted in 1940 it was broadened to include revoking and setting aside the judgment of naturalization.

A thoughtful observation of Section 738 leads to the conclusion that it creates, or particularizes, a *duty* for the District Attorney and does not create a new jurisdiction in the Courts. The jurisdiction to be invoked is as old as the hills and inherent in the Court,— the power to make its judgments speak truth, to purge its records of fraud, and grant relief to persons injured thereby. The Courts have always had that power; but District Attorneys, it would seem, would otherwise have no such duty, that duty resting upon the Attorney General of the United States (*U. S.* v. *Throckmorton*, 98 U. S. 61, 70). Always the

United States could apply through its Attorney General for a new trial, for a rehearing on newly discovered evidence, or could have moved to expunge the judgment for want of jurisdiction; and like any other litigant, it might ask a court of equity for relief against an extrinsic fraud practiced upon it to procure a naturalization; and the road to appeal has always been open to the United States, as one of the parties to the judgment of naturalization.

True, this Court has said that the right of appeal from, and the right to file a bill to vacate a naturalization judgment, are cumulative remedies (*United States* v. *Ness*, 245 U. S. 319); but, it is respectfully suggested, those rights, by their very nature, always existed, independent of Section 738, and this Court has so recognized them; but this Court did not say that the remedy in equity for relief from fraud or illegality could also be used as a writ of error to reverse a merely erroneous judgment, not by inspection of the record, but by a retrial of the issues. Each remedy has its distinctive field, and serves its own distinctive purpose.

U. S. v. *Ness*, 245 U. S. 319 was decided upon the assumption that there was no right of appeal from a naturalization judgment (P. 326). Later this court decided in *Tutun* v. *U. S.*, 270 U. S. 568, that a naturalization judgment "like other judgments of a court of record is accepted as complete evidence of its own validity unless set aside" (P. 577), and so has the stability furnished by the doctrine of *res adjudicata*.

An error remediable by appeal or writ of error is one that can be seen on inspection of the record,—whether that error renders the judgment void or voidable. Equity will relieve from the exercise of rights under a void judgment or a judgment voidable for extrinsic fraud.

A judgment illegally procured is void because of the absence of some jurisdictional fact either patent on the

face of the record, or latent in some jurisdictional fact, obviously existing, but which evidence will disclose did not in fact exist when the judgment was entered. If patent, the judgment is void and the error may be reached by appeal, writ of error, motion to expunge, or by complaint in equity to cancel a void certificate of naturalization, on the equitable ground of cancellation. And likewise latent extrinsic fraud is remediable in equity.

That the judgment of naturalization is a binding adjudication between the United States and the naturalized person, with all the attributes of finality, is indicated by Congress' direction to District Attorneys to apply to one of the Courts having jurisdiction to naturalize, to vacate the judgment and cancel the Certificate it authorizes, on the ground of fraud or that the judgment order and Certificate of Naturalization were illegally procured (8 U. S. C. A., Sec. 738).

Here all jurisdictional facts are admitted by the complaint to exist, and the only fraud charged is false testimony at the trial and a false oath of allegiance,—false testimony as to subjective matters respecting intent and mental attitudes,—intrinsic fraud.

When no bill of exceptions is taken to preserve the testimony of witnesses in a trial, their testimony becomes merged in the judgment. Everything necessary to the validity of the judgment is supposed to have been detailed in the evidence.

No one can tell from this record, but that all of the things said against petitioner as happening prior to his naturalization, were made known to the Judge hearing the naturalization proceeding, or was in the preliminary governmental examinations prepared for use on trial. There is no evidence in this record to indicate that any fact was withheld from

the government or the Judge at the naturalization trial. All of the things said, and that could have been said, are presumed to have been said; proving them a second time, for some other Judge to pass upon, is not the theory upon which such naturalization proceedings rest.

Such a dramatic event as shifting one's nationality, with all its implications, calls for an irrevocable judgment, protection against the renounced sovereign.

It is to be presumed that the Judge of the State Court heard and weighed each fact presented in this record as having occurred prior to April 13, 1937; and it is to be presumed that the Judge there held that there was nothing in those facts, everything considered, inconsistent with the allegations of the application for citizenship, and that every required intention was present, and that every necessary mental attitude existed. All such, once adjudicated, is unchangeably decided.

Intrinsic Fraud Is Not Remediable in Equity

False testimony is known as intrinsic fraud and cannot be remedied by a complaint in equity. The remedy for intrinsic fraud is in the suit in which the false testimony was given. In *U. S. v. Throckmorton*, 98 U. S. 61, 65, this Court said concerning an effort to reach intrinsic fraud by a complaint in equity:

> "The trial is the opportunity for making the truth appear. If unfortunately he fails, being overcome by perjured testimony and if likewise he fails to show the injustice that has been done him on motion for new trial, and the judgment is affirmed on appeal, he is without remedy * * * and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again, ad infinitum."

If it could be so done, petitioner might file a complaint to set aside the decree in this case because of the allegedly false testimony of the witness Merton, which petitioner strenuously insisted and still insists was perjured (Proceedings in *Knauer* case, pages 948-976).

The Federal Courts of Appeal have applied the ruling in the *Throckmorton* case to denaturalization cases. See *U. S.* v. *Norsch*, 42 F. 417 (1890); *U. S.* v. *Gleeson*, 90 F. 778 (1898).

The law has set time limits upon review by writs of error and appeal binding upon the United States the same as any other litigant, at the running of which, all errors for which judgments are voidable only, are cured. The law has set no time limit upon the United States to file a complaint to set aside a judgment void for extrinsic fraud or illegality.

It is to be noted that Section 738 was enacted after this Court had held in the *Throckmorton* case that intrinsic fraud was irremediable in equity; and after the *Norsch* and *Gleeson* cases had applied the doctrine of the *Throckmorton* case to denaturalization judgments. And the provisions of Section 738 were re-enacted in 1940 after this Court had held in the *Ness* case that a Naturalization proceeding was a case and that its errors might be corrected on appeal. From which the presumption appertains that Congress adopted the laws with those constructions.

And so it appears obvious that Section 738 did not change equitable procedure nor the basis upon which must rest all complaints in equity to vacate or overthrow judgments for fraud.

Fraud To Be Relievable Must Be Extrinsic

Fraud to void a naturalization judgment must be extrinsic and with reference to some demonstrable, objective

and jurisdictional fact, or matter connected with the management of the law suit.

The basis of this suit is intrinsic fraud. The complaint originally charged that the naturalization certificate was procured "fraudulently *and* illegally" and on trial was amended to read "fraudulently *and therefore* illegally", the charge being that the representations made in his petition and in his oath of allegiance were false.

Misstatements made in the trial of the issues pertaining to subjective matters are in the field of error, and are merged in judgment; the judgment is the act of the Court, not the parties, and is not subject either to collateral overthrow or direct attack upon an allegation in a complaint in equity that the testimony heard was false, or that the case was erroneously decided.

In the case of *United States* v. *Throckmorton*, 98 U. S. 61, this Court passed upon a Complaint filed by the United States to relieve from alleged fraud in the procurement of a decree where the complaint charged that a land grant had been fraudulently antedated and that the defendant has supported the antedated grant with depositions of perjured witnesses.

This Court, after discussing the basis of the relief there asked, and the adjudications pertaining to such question, said, (P. 68):

> "* * * the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the decree is rendered."

Fraud is said to be intrinsic where the fraudulent matters were in issue and could have been or were adjudicated. (*Hilton* v. *Guyot*, 159 U. S. 113); and where the Court had

before it the same issue of fraud and the same essential facts (*Toledo S. C. v. Comp. Scale Co.*, 261 U. S. 399).

The textbook says that relief from intrinsic fraud is denied because the issue was tried; and that relief from extrinsic fraud is allowed because there never was a trial (31 Am. Jr. 232).

The charge that the certificate was procured "fraudulently and therefore illegally" only means, legally speaking, that the charge is one of fraud. Fraud has to do with some type of deception or imposition upon the court or counsel, which all recognize and few can define. It is collateral to the issues—never in them, or of them—but is distinct from, and a legally different thing than illegal procurement, and is so considered by Congress.

Nature of Illegal Procurement

Illegal procurement, as distinguished from fraud, and as obviously visioned by Congress, is obtaining the naturalization judgment and certificate upon a record wherein some one of the objective jurisdictional requirements necessary to enable the Court to proceed to trial of the subjective issues is wanting; as, for example, where there was no certificate of entry attached to the petition (*U. S. v. Ness*, 245 U. S. 319); where the witnesses were not competent; where the required residence was not present (*Johansson v. U. S.*, 225 U. S. 227), or where some jurisdictional procedural requirement was not observed, as where the hearing was not held in open Court (*U. S. v. Ginsberg*, 243 U. S. 472).

Inasmuch as the charge here made has no reference to a judgment void for want of jurisdiction to hear the application, or for other jurisdictional defect, there was no illegal procurement, as all else pertains to trial and decision upon evidence pertaining to subjective matters—errors in deciding which lie in the field of error. The amendment of the

Complaint did not change the substance of the charge, which, being one of intrinsic fraud, in its nature admits the legality of the proceeding. A charge of intrinsic fraud does not challenge jurisdiction; it raises a question of error only. It raises no issue for adjudication. It is a feigned issue.

The District Attorney therefore misconceived the remedy for the alleged wrong and the District Court erroneously proceeded to trial upon the complaint.

The issues having been once adjudicated, this suit was therefore tried without subject matter.

II

Where the necessary jurisdictional facts are in a naturalization record, a decision of the Naturalization Court upon subjective issues is res adjudicata, and the remedy for erroneous appraisal of the facts, or false swearing, is by application to the Naturalization Court for a reconsideration of the issues, and appeal therefrom to correct errors. Equity is not the forum for such relief.

A

The United States is in charge of all naturalization proceedings and in legal effect a party litigant; made so by actual participation under authority of the statute and rules made pursuant to the statute.

It cannot be seriously contended that the United States is not a party litigant to a naturalization proceeding, for the Congress authorized its appearance (Sec. 734) and made it an active participant in such proceedings; the naturalization service supplies forms, makes investigations, takes depositions, makes reports and files them in the cause. The Service checks every applicant.

The United States may have a review of the proceeding in the Circuit Court of Appeals, or in the State Court of

Appeals, as may be, if it desires to question the judgment of the naturalization court.

THE GOVERNMENT GUIDES THE ALIEN TO CITIZENSHIP

From the day the applicant leaves the old country down to the moment of the final judgment of the naturalization, the United States Service watches over him. It is present at all of the preliminaries; it prepares the evidence, fills out the forms, examines the witnesses, searches the mind, the conscience of the applicant; educates him, attends the trial, hears the evidence, examines witnesses, objects, excepts. It either states there is no objection, or makes specific objection to the applicant. The Government is in fact the applicant's next friend, watching, counseling, advising, educating—but if not satisfied, objecting, excepting, appealing.

In *U. S. v. Kusche*, 56 F. Supp. 201, 230-233, the learned District Judge, Pierson M. Hall, in passing upon a group of Bund denaturalization cases, after detailing the many administrative activities of the Department in connection with the naturalization of an alien, said this (P. 233):

> "From the time the alien institutes in the country of his origin, with the American Consul, his application for a visa quota number, until the final oath, he is not opposing any Government officer or agency, or proceeding without them. But the Government literally takes the alien by the hand and leads him through this maze of forms, questions, examinations and re-examinations, and oath and swearings, including his education in the principles of the Constitution. The Government in effect is the alien's guide and mentor, and for all practical purposes has control of the proceedings. The alien can abandon his desire to proceed, but he cannot do anything about it. At no time can the applicant move forward towards his naturalization without going to the Naturalization Service of the Government or using the forms they supply to him.

and in fact cannot go forward without the aid and assistance of the Government."

Judge Hall could have added other suggestive regulations. In 8 CFR 70.14 it is provided that where objections "by the Service to the granting of a petition for naturalization is overruled by the court, exception should be noted of record" and a "comprehensive report made immediately in order to permit prompt determination of the question of review of the court's action through Appellate, cancellation or other proceedings." And in Section 70.22 (8 CFR) it is provided that in final hearings in open court where there has been preliminary examinations, "the examination shall be conducted by the naturalization examiner or officer in such manner that the rights of the United States will be conserved under Section 11 of the Act of June 29, 1906, (34 Stat. 599). * * *. If material objection be overruled by the Court, an exception will be noted for possible action on review and leave obtained from the court to submit the objection in appropriate form for the record."

70.11 (8 CFR) provides that Naturalization officers are authorized to appear in naturalization cases and participate in examinations on behalf of the United States, call witnesses, produce evidence and be heard in opposition to applications, and have a stenographic report made of the proceedings. And 70.12 (8 CFR) provides that if it is impossible for the Service to be represented in person in Court that that fact shall be transmitted to the Judge of the Court signed by the District Director or Divisional Director and mailed in ample time in advance of the hearing; that the petitions due to be heard are to be listed on the appropriate form with number and name, and with all statements of fact below the number and name of the case; and also "show all facts that have been developed

that may be unfavorable in nature, and, if any, the grounds for objection, with pertinent comment and citation of authorities in support of the objections. In favorable cases it will be stated that no objection appears."

By 70.19 (8 CFR) the officer conducting the preliminary hearings is required to keep a docket record on the named form of his findings, favorable and unfavorable, with reasons for unfavorable findings which is to be made available to the Judge when desired.

So completely under the control of the Department is the naturalization proceeding considered to be, that examiners and officers are warned that they "have no right or authority to administer the oath of allegiance to the petitioner who must appear in person in open court at the final hearing before the Judge of the Court for that purpose" (8 CFR 70.19).

In view of these regulations it is seen that the United States considers itself an active party litigant in each case; and it is seen that it actually appears in the conduct of the trial, or that it files a report therein either consenting to the applicant's admission, or objection thereto with reasons and a brief. The rules so authorize and direct, and we may assume the persons in charge perform their duties without proof that they do so.

The United States being in fact a party litigant in each case either consenting to the applicant's admission or objecting, it stands before the Court the same as any litigant and is bound by the same rules of law and evidence.

Here the doctrine of res adjudicata applies to the evidence introduced as to all subjective matters in issue pertaining to the period prior to April 13, 1937 and the judgment is final, there having been no appeal to test out the correctness of the adjudications, and existence of the objective facts being admitted.

BOTH LITIGANTS ARE BOUND BY THE ADJUDICATION

If any one of the objective qualifications, such as declaration of intention, years of residence, competent witnesses, port of entry, hearing in open court, etc., etc., is missing, an applicant has not become a citizen, the judgment being void and subject to collateral attack. No one is bound to respect such judgment. It is void for want of subject matter.

The subjective elements—intention, attachment to Constitutional principles, mental attitudes and behavior, are specifically submitted by Congress to the Courts for adjudication. Proof of these matters requires evidence by witnesses, to the satisfaction of the Court. When such judicial investigation has been concluded, and the applicant ordered admitted, the proofs are merged in the judgment and the judgment becomes the objective fact that binds up all of the subjective matters together so that the citizenship is de jure and the finding of the existence of the subjective requirements congeals them into an objective fact along with the declaration of intention, the residence requirement, etc., etc.

When the objective jurisdictional facts admittedly exist, and the subjective issues are tried and the findings merged in the judgment with the jurisdictional facts, both parties are bound by the judgment. The applicant will not be heard to say he did not intend to renounce his allegiance to his native country nor that he took his oath with reservations. He is estopped, and being estopped, the United States is likewise bound. Both are bound or neither.

B

WHERE THERE IS JURISDICTION TO HEAR, THERE IS POWER TO DECIDE AND SUCH DECISION IS RES ADJUDICATA

The Constitution gives no power to Congress, and never has, to repudiate a naturalized citizen because of subsequent conduct, to deport him beyond the realm, expel him, or

destroy his citizenship by any type of action. He stands, when judicially admitted, upon the same ground as the native born.

Nor has Congress ever drawn a line between the native born and the "naturalized" citizen so as to put them on a different footing.

And this Court repudiated that doctrine in the *Schneiderman* and *Baumgartner* cases where conduct after naturalization had been erroneously given the same relevancy as that of the alien on probation.

To "establish uniform rules of naturalization", pertains to the admission of persons to citizenship, not to denaturalization after admission. The later power Congress does not have. But Courts do have power to set aside any of its own judgments when the jurisdictional elements are not present. That power is inherent in all courts and is a necessary power which it exercises to keep its judgments pure and truthful. That power is *recognized* by Congress,—not *granted* by Congress.

It, obviously, never was the theory of Congress to create a system of admitting aliens to citizenship, by judicial order and yet empower District Attorneys to undo at their discretion the very adjudications of the Courts so authorized; they are empowered to bring to the official attention of the Courts void proceedings by which void certificates have been issued to unqualified applicants.

Where There Is Jurisdiction to Hear the Application the Judgment Is Final

Once a person with the jurisdictional qualifications is admitted to citizenship, he is as a drop of water in the ocean, and loses individuality. He wears no stigmatizing letter, no identifying apparel, no leading strings, nor strait-jacket, as Mr. Justice Murphy terms it.

The Congress did not make it the duty of District Attorneys to appear in the citizenship proceedings and try the stereotyped issues framed by Congressional forms but Congress delegated to the Courts, and to them judicially, the matter of inquiry into, and adjudication of, the issues made by the application and to decide those issues by examination of the applicant and his necessary witnesses. All such proofs merge in the order establishing citizenship in the applicant and the facts become a thing decided, adjudicated, and res adjudicata between the United States and the applicant.

To overcome such adjudication, the requisite evidence must be something that concerns jurisdiction to hear and determine the application, something missing or wrong that would overturn the judgment; something that goes to jurisdiction to hear and determine; and of such nature as to prove the judgment to be without foundation.

Error in appraising the evidence on the subjective issues goes the way of all error, through courts of appeal.

The Government did not here plead that it had newly discovered evidence that would prove the falsity of the oaths of the applicant. The allegation goes only to attack the mental attitude and intentions, or lack of intentions, of petitioner at the time he applied for and at the time he was admitted to citizenship, which was the very issue delegated by Congress to the Naturalization Court.

Every objective jurisdictional fact necessary to citizenship is admitted by the Government. The complaint attacks only those subjective requirements which the Congress delegated to the Courts—the power of establishing citizenship by judicial findings. And the Government here admits that those judicial findings were made.

There is no substantial, first hand, affirmative, direct, evidence in the record tending to prove in any degree that petitioner, when he swore to his application, or when he

was examined by the Court, or when he took his oath of allegiance, had any mental reservations whatever, or had no intention to observe his oath, or that he had falsified his several oaths. Whatever evidence the Government produced raises only reflection, or deduction, an inference, or presumption, or suspicion.

The Government did not show that applicant swore falsely. It only offered evidence to show that defendant did what native-born citizens might legally do.

Obviously a naturalized citizen cannot be denaturalized, deported, expelled, for the exercise of privileges permissible to the native-born. Equal protection forbids.

Where the objective type of jurisdictional facts are present and, after hearing evidence on the subjective issues, an applicant is admitted to citizenship in all due legal form by judicial action, he is then a bona-fide citizen. That is this case.

The judgment is not void in any sense. Nor is it voidable except by appeal. Being then a citizen, albeit judicially born, he is then entitled to equal protection of the laws and may not be denaturalized for any cause or reason not going to the jurisdiction of the Court to hear the petition. Subsequent conduct of any type would not render the judgment void.

Being made a citizen by a judicial decree, standing unreversed of record, and performed by the applicant by acceptance and assumption of the status, duties and obligations of citizenship, the decree has been performed and the whole matter is in the past perfect tense. All acts thereafter done, all opinions thereafter expressed, are those of a citizen under protection of the Constitution but subject to the law.

The newly-made citizen is bound by his oath of allegiance. Being bound by the new tie the United States likewise is bound. Both are bound or neither.

That such adjudications are res adjudicata between the parties, this Court has in effect held or has clearly so recognized.

It is thought that the point was decided in *Ness v. U. S.*, 245 U. S. 319, which was a petition in the District Court for the Northern District of Iowa to cancel a certificate of naturalization of a State Court for failure of Ness to file with his petition a certificate of the Department, "stating the date, place and manner" of arrival as provided in the Act. The United States had entered its appearance in the naturalization proceeding and moved to dismiss on the ground that such certificate was not filed. The motion was considered and denied. Petitioner and his witnesses were heard and the naturalization granted.

At that time, 1917, it was considered that appeal did not lie from the order of naturalization (p. 326).

Within six months the Government filed complaint to cancel the certificate of naturalization of the State Court.

Ness showed that when he arrived from Norway he was ignorant of the law, and unobserved, strayed away and entered the United States without being physically examined, paying the head tax and having his entry registered. After being admitted to citizenship he offered to pay the tax and take the physical but was refused. All other qualifications he had.

It was claimed by Ness that the missing certificate was a matter of form but it was held that it was one of substance which the Court had no power to waive, hence jurisdictional.

It was claimed by Ness that in any event the judgment was res adjudicata because the Government had appeared and contested. The Court said:

> "Opposition to the granting of a petition for naturalization may prevail because of objections to the competency or weight of evidence, or credibility of wit-

nesses or mere irregularities in procedure. A decision on such minor questions, at least of a State Court of Naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. For Congress did not see fit to provide for a direct review by appeal or writ of error" (pp. 325-26).

This Court reversed the decree and held that the naturalization certificate was "illegally procured."

Since that decision, this Court considered *Tutun* v. *U. S.*, 270 U. S. 568, and held that an appeal may be taken from naturalization judgments and the objections to res adjudicata of such judgments disappear, if any ever were tenable.

But the *Ness* case does support the contention here that the decision of a Naturalization Court is res adjudicata on all subjective issues tried by *pro and con* testimony so as to reduce the unknown quantity to a fact—which fact, so ascertained, is then a jurisdictional capstone to the naturalization structure. And that capstone is one submitted by Congress to the Naturalization Court for final judgment.

The same question was before this Court in *Schneiderman* v. *U. S.*, 320 U. S. 118, where it was contended that Schneiderman had falsely concealed his membership in the League and the party (Communist) from the naturalization court and that his oath of allegiance was false (p. 129). The trial court had held that the oath was false and the certificate illegally procured. The opinion of this Court was on the question of fact, reversing on the ground that the charge was not proven by clear, convincing and unequivocal evidence. But Mr. Justice Douglas, concurring, took the position that when the statutory requirements of a naturalization judgment are in the record,

i. e., when it is fair upon its face, its sufficiency to support the judgment cannot be questioned (p. 164), which means, as we interpret, that all those matters, subjective in nature, submitted by Congress to the decision of the Naturalization Court upon issues is res adjudicata. And Mr. Justice Rutledge also concurring was of opinion that Congress had no power to submit the naturalization of citizens to the Courts for judicial determination with a string on the applicant to pull him back to the status of an alien at will; i. e., that the judgment of the Naturalization Court upon the issuable facts, becomes final and may not be reviewed collaterally or the facts tried out de novo, which means that the naturalization judgment is res adjudicata on those matters referred by Congress to its designated naturalization courts.

The defendant is bound by the judgment, *if against him*, on that doctrine, and so must the United States be.

All of which is consistent with the right of the United States to collaterally attack a judgment of naturalization on the ground that some jurisdictional fact necessary to its validity is missing, rendering it void. A void judgment may be attacked anywhere, any time, but a judgment is not void which has been entered upon a controverted issue, if the Court has jurisdiction to decide the issue. Such a judgment is res adjudicata between the parties and not subject to be again litigated. It becomes a fixed fact, indisputable.

III

The trial in the District Court and the decision in the Circuit Court of Appeals violate the positive rule announced in the Schneiderman case and confirmed in the Baumgartner case—that to support a decree canceling a certificate of naturalization — conduct prior to the naturalization judgment must be clear, unequivocal and convincing; and that conduct as a naturalized citizen subsequent to the naturalization judgment is of little relevancy.

The clouds had been gathering for a year or two prior to the decision of the *Schneiderman* case, and there had developed a policy and movement in the Government to group together for trial persons charged with having obtained their naturalization certificates by fraud and illegality. Such trials were developing in all or most of the Circuits. It was in light of that condition that the *Schneiderman* case was argued, considered, re-argued, re-considered, and decided; and the rule announced was obviously made to aid trial courts and Appellate tribunals in disposing of the many cases working their way through the dockets, as the opinion indicates.

In the *Schneiderman* case, decided June 21, 1943, this Court changed the civil evidence rule in denaturalization cases from probability to clear, convincing and unequivocal evidence that leaves no doubt; and, holding that such measure applies to expressions and conduct in the period prior to the judgment of naturalization, and holding that conduct and expressions after being made a naturalized citizen were of little relevancy in determining the mental attitudes and behavior prior to the admission to citizenship.

When this Court filed its opinion in *Schneiderman* v. *U. S.*, 320 U. S. 118, its far-reaching effect became immediately known. It had been publicly known that it had been ar-

gued and re-argued, and when decided the public press carried its import and the opinion became available to judges and attorneys.

The group of Milwaukee cases had been prepared while the *Schneiderman* case was pending in this Court and under consideration; this case was filed on February 3, 1943; on May 12, 1943 motion was made to consolidate the several pending cases and on June 16, 1943 the order of consolidation was entered.

On June 21, 1943 the *Schneiderman* case was decided. On June 30, 1943 the Circuit Court of Appeals for the Seventh Circuit filed its opinion in *U. S.* v. *Krause*, 136 F. 2d 935, in which it considered the effect of the *Schneiderman* case on the Bund cases, and instead of following it, held, in effect, that the *Schneiderman* case was an isolated case and was not intended to affect the theory on which denaturalization cases had been tried up to that date, i.e., by considering the evidence of the whole conduct of the applicant before and after naturalization and down to the date of trial as of equal relevancy.

On September 10, 1943 a pretrial conference was held in the Bund cases and a plan of procedure was adopted. The statements of the trial judge made on that date are not in the record; but, on the opening of the trial of the case on September 21, 1943, for the benefit of some who were not present at the pretrial conference, the trial judge announced his position with reference to the relevancy of the statements and conduct of the defendants.

The trial judge, I feel it my duty to say, purposely did not follow the rulings of this court in the *Schneiderman* case. His refusal or failure to do so was on the ground that the Circuit Court of Appeals of the Seventh Circuit had held that this Court had not overruled the long line of cases in which citizens had been denaturalized on proof of acts and expressions years and years after naturalization;

and his hesitancy to follow the ruling of this court was that he felt "bound to follow" the interpretations put by the Seventh Circuit Court of Appeals upon the rulings of this Court in the *Schneiderman* case, regardless of his personal interpretations,—for he remarked to all counsel and litigants in advance of trial how he would rule. At the pretrial conference he stated his position and at the opening of the mass trial he reiterated it, remarking:

> "I should repeat here what I said at the pretrial conference, that it will be my *endeavor* in this case to apply the rules as laid down by the Supreme Court *and as interpreted by our Circuit Court of Appeals of the Seventh Circuit.* It may well be that their interpretation *does not entirely coincide with some other Circuit Courts of Appeal, but I feel bound to follow as nearly as I can their opinion in this matter, their ideas, their interpretation*" (Mass trial Record, p. 18).

That was the viewpoint of the trial Judge when he started and which he consistently maintained throughout the trial; and when the *Baumgartner* case was here decided, and he had seen the opinion before he filed his findings, he added a comment to his findings, that he had seen the *Baumgartner* opinion but still adhered to his viewpoint that the subsequent conduct of petitioner proved petitioner guilty of fraud beyond all doubt and refused to rule that the subsequent conduct of petitioner was not relevant or controlling (Tr. 43).

It is of marked significance that along with his comment on the *Baumgartner* case the trial Judge filed an opinion in support of his findings and conclusions in which *he did not mention the Schneiderman case; he did not try to follow it, he ignored its rule, teaching, and logic.* On the contrary his opinion cites the line of extreme cases where citizens had been denaturalized on subsequent conduct, and the doctrine of all of which was overruled by the *Schneiderman* and

Baumgartner cases, and some of which were later reversed in their Circuit Courts of Appeal.

In his opinion the trial judge relied upon the case of *U. S.* v. *Krause*, 136 Fed. 2d 935 (Seventh Circuit), in which that Court said that it did not believe that this Court intended to overrule the long line of cases in which subsequent conduct and expressions had been relied upon as competent proof; there was no prior conduct shown in that case; so it would appear that the Seventh Circuit Court of Appeals was appraising the rule announced in the *Schneiderman* case as isolated and as applying to its own peculiar facts for it says (P. 939):

> "We are convinced that in the case at bar (Krause case, 136 F. 2d 935, 939) the Government *did sustain* the burden of proving that appellant's *conduct and expression in later years* were opposed to the principles of the Constitution. *Applying the long line of cases* (none cited) *the* (Supreme) *Court does not overrule in the Schneiderman case*, we are further convinced that *such conduct and expression may be relied upon to* show that the oath of allegiance was taken with such mental reservations as to render it wholly nugatory, and that being the case, that the certificate of citizenship issued in reliance thereon was *illegally procured*." (Italics for emphasis.)

From that statement it is seen that there the affirmance was based on "conduct and expression in later years."

That is the ruling of the Seventh Circuit Court of Appeals made in face of the expression of this Court in the *Schneiderman* case (P. 147):

> "Since the immediate problem is the determination with certainty of petitioner's beliefs from 1922 to 1927, events and writings since that time have little relevance, and both parties have attempted to confine themselves within the limits of that critical period."

And the trial court, following the ruling in the *Krause* case, ignored the rule of the *Schneiderman* case and adhered to his decision in face of the positive statement in the *Baumgartner* case appearing in the Concurring Opinion of the Justices who wrote the opinion in the *Schneiderman* case (P. 678):

> "The decision in the Schneiderman case was not merely a decision of an isolated case. It was a formulation by a majority of the court of a rule of law governing all naturalization proceedings."

And that, with certainty, meant this case which he was then deciding.

Your petitioner respectfully suggests that the Seventh Circuit Court of Appeals appears by its opinions not to have grasped the basic significance of the increase in the degree of proof of prior conduct, and the depreciation of the relevancy and value of subsequent conduct and expression, wrought by the decision in the *Schneiderman* case, and as confirmed in the *Baumgartner* case, and that the Seventh Circuit is out of step.

Other Circuit Courts of Appeal and District Courts are following those rulings.

The Fifth Circuit Court of Appeals recognized the change in reversing the trial Court in *U. S.* v. *Meyers* 141 F. 2d 835, 826, 832. And the Judges in the Ninth Circuit also follow on the same theory, in *Bergman* v. *U. S.* 144 F. 2d 34; also *U. S.* v. *Kusche* 56 F. Supp. 201, 238-239. The Second Circuit follows, *U. S.* v. *Rossler*, 144 F. 2d 576; as also the Fourth Circuit, *Orth* v. *U. S.* 142 F. 2d 898.

The Cases Relied on by the Trial Court

These are thumbnail sketches of the cases the trial Judge relied upon in preference to the rule in the *Schneiderman* and *Baumgartner* cases.

U. S. v. *Krause* 136 F. 2d 935 where a certificate was cancelled for subsequent conduct, which that Court spoke of as "illegally procured."

U. S. v. *Chuckardt* 49 F. Supp. 567, where a certificate was cancelled in reliance upon *U. S.* v. *Baumgartner* 138 F. 2d 29, 47 F. Supp. 622 subsequently reversed; and *U. S.* v. *Bergman* 47 F. Supp. 675, which was subsequently reversed in 144 F. 2d 34, in reliance upon the *Schneiderman* case.

Schurmann v. *U. S.* 264 Fed. 917 where Schurmann's Certificate issued in 1906 was cancelled for statements made in 1917.

U. S. v. *DeTolna* 27 F. 2d 984, where his certificate was cancelled on his *admissions* that his witnesses were not qualified; which case was *properly decided* because the certificate was *illegally procured.*

U. S. v. *Kuhn* and 19 others, 49 F. Supp. 407, decided before the *Schneiderman* case where preponderance was the rule and reliance was placed on the subsequently reversed *Baumgartner* case. The case of those of the defendants who appealed were reversed, 144 F. 2d 576 in reliance upon the *Schneiderman* and *Baumgartner* cases.

Turley v. *U. S.* 31 F. 2d 696 decided before the *Schneiderman* decision and where the conduct of the defendant was held relevant down to the date of the trial.

U. S. v. *Orth* 51 F. Supp. 682 which was subsequently reversed, 142 F. 2d 969.

U. S. v. *Holtz* 54 F. Supp. 63 where the trial Court applied the doctrine of "relation back" and which case has clearly ignored the rulings in the *Schneiderman* and *Baumgartner* cases.

The trial Court, it is obvious, made no effort to decide this case upon the evidence of actions and statements of petitioner prior to his admission as a citizen, or even to evaluate them separately.

The record is top heavy with evidence as to what was said and done after April 13, 1937. There is nothing in this record transpiring prior to April 13, 1937, that can be said to be inconsistent with petitioner's application for citizenship or with his oath of allegiance, or tending to show that any fraud was practiced upon the government or court, or that petitioner in anywise perjured himself or misrepresented any fact; and none that his witnesses were in any wise incompetent or untruthful.

In fact there was no attack made upon the regularity and conclusiveness of the record of the Wisconsin State Court, nor is there such thought in the form of, or charges in, the complaint.

The sayings and doings of petitioner after April 13, 1937 are practically of no probative effect. Petitioner was then a citizen; and, if what he did as a naturalized citizen was permissible to a native born citizen, and there is no contention that it was not, then the fact that he exercised the prerogative of the native born, should not be heard as evidence that fraud and perjury were theretofore committed at the time he was naturalized.

Proof of things legally permissible to a native born citizen is no evidence of criminality if done by a naturalized citizen.

In the *Schneiderman* case this Court said that actions and expressions after an order of naturalization are of little relevance and that the five year period prior to admission was the critical period of inquiry (P. 147).

In the *Baumgartner* case it is said in the concurring opinion that the decision in the *Schneiderman* case "was not merely a decision of an isolated case. It was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings" (P. 678).

The Court's opinion in the *Baumgartner* case points out that what is done after naturalization is not done by an

alien *but by a citizen* with all the rights of the native born. The opinion in the *Baumgartner* case says:

> "New relations and new interests flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority." (P. 675).

The concurring opinion in the *Baumgartner* case points out that a newly naturalized citizen "does not lose the precious right of citizenship because he subsequently dares to criticize his adopted Government in vituperative or defamatory terms" (P. 629).

We respectfully suggest that where, in view of the expressions of this Court in the *Schneiderman* case, the trial Court and Circuit Court of Appeals did not separate nor appraise separately the facts according to the periods before and after naturalization, and did not give them their relative significance and weight, it becomes obvious that the Circuit Court of Appeals ignored the rulings in the *Schneiderman* case, and that the trial court purposely followed the ruling of the Circuit Court of Appeals.

The viewpoint of each court is out of harmony with the decisions of this Court in the *Schneiderman* and *Baumgartner* cases and in conflict with the rulings and decisions in other Circuits, and it is respectfully suggested that this court should take this case for decision.

IV

The complaint being one for intrinsic fraud does not state a cause of action in equity, and the court is without jurisdiction of subject matter.

The complaint in this case does not state a cause of action in equity to vacate the judgment of a court of co-ordinate jurisdiction: where the scope and purpose of the

complaint is to overturn the judgment on the ground of intrinsic fraud no statement of facts however detailed will aid it. Here only ultimate facts are pleaded but it plainly shows that it seeks relief from intrinsic fraud and nothing else.

The charge in the complaint that the statements and oath of petitioner were false and fraudulent as to subjective matters submitted to the Courts by Congress for decision, upon evidence to be adduced, does not overcome the force and effect of the admittedly valid judgment of the Wisconsin State Court upon that very evidence, which stands as a thing decided between the parties. The force of the adjudication of the Wisconsin State Court, which admittedly had jurisdiction to hear and decide, is stronger than the abstract charge of fraud in reference to the adjudication of subjective issues specifically entrusted to it by the Congress.

Judgments of naturalization are not vacated as matter of course, and Congress could have had no intention of making judgments of naturalization vulnerable to abstract charges of fraud. Citizenship is not so cheap.

The obvious effort of petitioner to protect the Milwaukee citizens of German descent from the natural prejudice of the day, judging from the publicity given to his acts, was known to the State Court officials, the Federal officials, and every one connected with naturalization, as well as the Public, at the time petitioner applied, and when his petition was heard. There was no secrecy about it. If there was any perjury or coloring of facts in the case, it would not have escaped notice of the Judge of the State Court who had before him the investigations and recommendations of the Federal Investigators in the file, and who doubtless knew the local color.

His acts were not then considered to be of such nature as to bar his application for citizenship; how much less

are they now a cause for vacating the judgment of naturalization?

Time ran, war came and the viewpoint of officials changed.

The bare allegation of intrinsic fraud, stated in the form of a conclusion, has made this record of 2500 pages of testimony, and hundreds of exhibits, possible.

V

The findings of the Trial Court and the judgment of the Circuit Court of Appeals reflect the influence of war hysteria.

The record in this case is too voluminous to attempt to discuss more than its outlines and the times and political atmosphere out of which this case grew, and did not grow. It is thought that a few sentences might not be inappropriate to refresh recollection of the era in question, the period in which petitioner's conduct is to be judged.

It was a peacetime era. Hitler had not taken Austria; Munich appeasement had not been given; Czechoslovakia had not been invaded; Poland had not been attacked.

The star of Hitler was in its ascendency. Rulers, emperors, kings, prime ministers, were visiting him, not he them. A new hero had arisen for worship. Napoleonic days were here again. Millions paused to admire. It was in that era of old world politics that petitioner was on probation awaiting the days of his citizenship.

The world was full of new movements headed mostly by young, ambitious men. Corporal Hitler, Corporal Mussolini, Corporal Stalin, Sergeant Batista, General Franco had come of ruler age. So had others of World War I era. The Soviet, Nazi, Fascist, New Deal of France, New Deal of the United States, were each supposedly liberating, saving humanity, in its own way. It was ambitions' hour, and the day of exaggerated ego.

All of the German American activities in question were peacetime activities. It was all legal. It was national ferment. American politics organizes groups for political prestige. No one objects. It's American life. There are the thousands of societies, organizations for this and that.

There was no incon istency in any alien being active along with citizens in such matters and at the same time applying for citizenship. Why not, that is what the citizen does.

The thought of 1937 found no objection.

The thought of the war era looks back and finds things not to its liking. It objects.

When this case was tried a different world was functioning than existed in 1937. Germany had declared war on Poland, England and France had declared war on Germany. Pearl Harbor was past tense and we were at war with Germany and Japan, and Russia had become involved; the Balkan countries were overrun and Germany had overrun the lowlands and Norway. France had surrendered and England, the United States, Russia, China and the world generally were engaged in a mighty struggle. It was World War II traveling in high.

That was the era in which this trial was planned and commenced. By that time there were accumulated hatreds, exaggerated expressions, that warped the feel of justice. This case was tried with war hysteria in full swing. Hatreds were preached. Our Japanese citizens were referred to as monkey men and the Hun was at his atrocities again. Men were fighting, dying. That was the backdrop for the trial of the peacetime case of 1937. It was being interpreted in terms of war.

Great men of this country had been cursed for neutrality and smeared, as the expression is, and discredited, when their highest thought was the good of their country. It

is so in every wartime era. They cry peace but there is no peace.

There is assumption in this case that everything petitioner did was wrong and a part of Germany's war effort.

Almost the entire opinion of the Circuit Court of Appeals is taken up with a vigorous denunciation of the Bund, its purposes and its program; and the whole argument of the findings of the trial judge is taken up with the same thought.

Strike out what is said on that topic and there is no basis to either the findings of the trial judge or the opinion of the Circuit Court of Appeals. It is based on war when there was no war at the time in question.

The District Attorney could not prove, and did not prove, that petitioner was a Bund member. He called defendant as his witness for cross-examination and had him on the stand a day and a half (*Knauer* record pages 156-384) in an effort to prove it and finally put the direct question to defendant whether he were a member of the Bund and the answer was, "Never."

> Mr. Becker: Q. Were you a member of the Bund?
> A. Never.
> Q. Did you ever sign any petition or written document of any kind for membership in the Bund?
> A. Never. (*Knauer* case, testimony page 365.)

The trial judge had already held that membership in the Bund was not in itself sufficient to prove fraud which would warrant a judgment of cancellation of a naturalization decree (Conclusion to Mass Trial evidence, Tr. 27).

It was also found that one of the purposes of the Bund was to keep America out of the war (Finding 15, Tr. 24). The war started September 3, 1939. Petitioner was admitted to citizenship April 13, 1937, two and a half years before war was declared.

The trial court found that petitioner had joined the German-American Alliance shortly before his naturalization. It was a chartered organization under Wisconsin law and its purposes were to unite unto a union and federation all societies in Wisconsin whose members were of German origin and preserve all rights unabridged which the Constitution of the United States guarantees to its citizens and people of this nation and to support and maintain the Constitution in its integrity (Exhibit PK13, *Knauer* Record 463).

These matters are suggested to indicate that only one side of this case appears in the findings of the trial judge and that when the evidence is placed before the court in a comprehensive manner it will sufficiently appear that there was nothing inconsistent in petitioner's conduct and the highest esteem for the liberties guaranteed by our Constitution and laws.

Conclusion

It is, therefore, respectfully suggested that the questions here urged are not idle, or frivolous, but substantial; that the Decree of the District Court and the judgment of the Circuit Court of Appeals affirming it, have operated to deprive petitioner of equal protection of the laws and the basic rights of naturalized citizens to the guaranteed freedoms upon faith of which they seek naturalization; and for the exercise of which petitioner here has been in effect expelled.

Wherefore, it is respectfully suggested that in the interests of justice, the Writ of Certiorari should be granted as prayed.

All of which is respectfully submitted.

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